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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK J. HRIBAR, Petitioner,

v.

TRW, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a dismissal with prejudice an abuse of discretion where the district court fails to make express findings concerning whether less drastic sanctions will equally serve the punishment and deterent aspects of Federal Rules of Civil Procedure, Rule 41(b)?

2. Is a dismissal with prejudice for failure to prosecute dated October 31, 1985, an abuse of discretion when the case was placed on the active trial docket on September 12, 1985; the case first having been dismissed without prejudice with the order noting the court to retain complete jurisdiction to vacate the order if settlement not completed?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Jack J. Hribar and the respondent TRW, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK J. HRIBAR, Petitioner,

v.

TRW, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner Jack J. Hribar respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on February 10, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is found in the

Appendix hereto, Page 1a, and has not been reported.

The Memorandum and Order Decision of the United States District Court for the Northern District of Ohio, Eastern Division (Aldridge, D.J.) has not been reported. It is found in the Appendix hereto, Page 13a.

JURISDICTION

The petitioner brought this suit in the Court of Common Pleas for Cuyahoga County, respondent removing said case to the United States Federal District Court for the Northern District of Ohio, Eastern Division. On October 31, 1985, the district court granted respondent's Motion to Dismiss. See Page 13a infra.

On petitioner's appeal, the Sixth Circuit on February 10, 1987, entered a judgment with an opinion affirming the District Court's judgment of dismissal. See Page 1a infra. No petition for rehearing was sought.

The time for filing this Petition for Writ of Certiorari extends to and includes May 11, 1987.

The jurisdiction of this court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

RULE INVOLVED

Federal Rules of Civil Procedure, Rule 41. Dismissal of actions.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.... unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked pursuant to the filing by respondent of a Petition for Removal to the Federal District Court. Jurisdiction for the removal is based upon the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sections 1001 et seq., and Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185.

Petitioner was employed by Respondent from January 10, 1949 until January 24, 1979, with one short interruption. Petitioner believes that his employment contract with Respondent permits him to return from his salaried supervisory position to the hourly bargaining unit where he originally worked for the purpose of retiring with benefits from the hourly retirement plan rather than benefits from the salaried retirement plan. Petitioner has not been permitted to retire pursuant to the hourly retirement plan.

On January 19, 1981, a Complaint was filed in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. C-81-92. Jurisdiction was based upon the Age Discrimination and Employment Act (ADEA) as amended, 29 U.S.C. Section 621 et seq. with additional claims for breach of an oral contract of employment pursuant to pendent jurisdiction of the court. On January 7, 1982, an order dismissing the pendent state claims without prejudice to petitioner's right to raise them in an appropriate state forum was filed by the court. On January 12, 1982, the district court dismissed with prejudice petitioner's claim under the Age Discrimination and Employment Act.

On March 11, 1982, petitioner filed a Complaint in the Court of Common Pleas for Cuyahoga County, Ohio, Case No. 40360, captioned Jack J. Hribar v. TRW, Inc.,

alleging breach of an oral contract of employment and fraud in the inducement to contract which claims were essentially identical to the claims made in the pendent state claims in the first case filed in the Federal District Court, Case No. C-81-92.

On April 19, 1982, respondent filed a Petition for Removal of the Common Pleas action to the United States District Court, Northern District of Ohio, Eastern Division.

On February 22, 1983, this case was dismissed without prejudice with the court specifically retaining jurisdiction to vacate the order and to reopen the action if settlement was not completed. See Appendix Page 18a.

On August 14, 1985, Appellant filed a Motion to Reduce Settlement Agreement to Judgment with attached Brief. Subsequent to pre-trial the court denied said Motion. The trial court ordered the case reopened and

placed it on the trial calendar on September 12, 1985. On October 31, 1985, the court ordered that this case be dismissed with prejudice pursuant to the Federal Rules of Civil Procedure, Rule 41(b) for failure to prosecute the action promptly. See Appendix Page 13a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DOCTRINE OF MAKING EXPRESS FINDINGS CONCERNING WHETHER LESS DRASTIC SANCTIONS WOULD EQUALLY SERVE PUNISHMENT AND DETERENT ASPECTS OF FEDERAL CIVIL RULE 37 AND 41(b) SHOULD BE EXTENDED TO ALL CIRCUITS.

This court ruled in Link v. Wabash Railroad Company, 370 U.S. 626 (1982) that a dismissal pursuant to counsel's failure to attend a pre-trial conference and postponing of two trial dates was an appropriate sanction. The Fifth Circuit in Batson v. Neal Spelce Associates, Inc., 765 F.2d 511 (5th Cir. 1985) has extended this doctrine in that the trial court must determine whether a less severe sanction other than dismissal with prejudice would have equally furthered the important deterent aspect of the rule governing discovery sanctions.

In the case at bar, there has been no finding by the trial court that lesser sanctions would equally serve the efficient

administration of justice. No prior sanctions were ever initiated by the trial court.

Petitioner was employed by respondent for approximately 30 years. Petitioner relied upon his ability to retire pursuant to the Hourly Pension Plan, in continuing his employment and in accepting a salaried position with respondent based upon his perception of his ability to retire pursuant to the Hourly Pension Plan. Throughout the course of this litigation, petitioner has sought redress for the failure of respondent to transfer him to the bargaining unit, thus allowing him all of the rights, priviledges and consideration accorded employees who retire under the Hourly Pension Plan. Petitioner in good faith, attempted to enter into an agreement for the complete settlement of this matter. Respondent prepared documents in conjunction

with such settlement agreement, and pursuant to a difference of opinion between counsel for petitioner and counsel for respondent, the settlement was not effectuated. The Memorandum and Order of the trial court filed on September 23, 1985, indicates that

> "The court does not question the honesty of either attorney, for misunderstandings are an every day occurrence and a prime reason for the need of an adjudicatory system. Each attorney appeared sincere in his resitation of what happened in that January 15th conversation. Since neither attorney was more persuasive than the other, the court must look to who has been alloted the burden of proving the issue."

Petitioner has no other remedies to right the wrong that has been perpetrated upon him. The aims of the trial court in efficient disposition of its cases should necessarily include a determination that lesser sanctions than dismissal with prejudice would be ineffective prior to entering a dismissal with prejudice.

II. THE ORDER OF THE TRIAL COURT DISMISSING THIS CASE WITHOUT PREJUDICE AND SPECIFICALLY RETAINING JURISDICTION, FOLLOWED BY REINSTATEMENT TO THE TRIAL DOCKET WITH AN ORDER OF DISMISSAL WITH PREJUDICE 48 DAYS LATER RAISES IMPORTANT ISSUES AS TO THE PROCEDURE TO BE USED BY TRIAL COURTS IN THEIR USE OF RULE 41(b) SANCTIONS

The trial court first dismissed this case without prejudice. Although not specifically provided for in the Federal Rules of Civil Procedure, the trial court indicated in its order that it retained jurisdiction to vacate said order in the event that settlement was not reached. For reasons not essentially at issue, a substantial amount of time passed during which time it became evident that settlement would not be reached. Although the parties were aware of the failure to reach a settlement in February, 1985, a Motion to Reduce the Settlement Agreement to Judgment was filed on August 14, 1985 by petitioner.

The matter was placed back on the trial docket of the court on September 12, 1985, followed by a dismissal for failure to prosecute on October 31, 1985. If the case in fact was dismissed without prejudice, then the matter should properly come before the court for further disposition only in the event the court reopens the case pursuant to proper motion. It cannot be said that the case was pending throughout the period of time from September 23, 1985 through August 15, 1985, when petitioner filed a Motion to Reduce Settlement Agreement to Judgment. The docket therefore reflects that the dismissal for want of prosecution occurred from the time the matter was brought before the trial court in September, 1985 through the time of the granting of the dismissal in October, 1985.

Therefore, there is clearly an abuse of discretion in such a dismissal where a case is before the court for such a short period of time.

CONCLUSION

The Fifth Circuit's procedure in regard to a trial court's entering appropriate findings where a trial court dismisses a case with prejudice gives clear guidance to trial courts in order to avoid inequities such as the one associated with the case at bar. Such guidance is important for the efficient administration of justice and to prevent inequities in the application of the Federal Rules of Civil Procedure.

Respectfully submitted,

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NOT FOR PUBLICATION

NO. 85-4016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK HRIBAR	)	
	)	
Plaintiff-Appellant	)	ON APPEAL FROM THE
	)	UNITED STATES DIS-
v.	)	TRICT COURT FOR THE
	)	NORTHERN DISTRICT OF
TRW, INC.	)	OHIO
	)	
Defendant-Appellee	)	

Decided and filed

BEFORE: KRUPANSKY and RYAN, Circuit Judges; and Edwards, Senior Circuit Judge

PER CURIAM. The plaintiff-appellant Jack J. Hribar ("appellant") appealed the district court's order granting TRW's motion to dismiss the appellant's case, with prejudice, for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

The appellant had been an hourly emloyee of TRW from 1949 to 1966. During that period he was a member of the Aircraft Workers

Alliance ("AWA") which represented all hourly, non-supervisory employees at TRW's Greater Cleveland facilities. Thereafter, from 1966 until his resignation in 1979, except for a one-and-a-half year hiatus, the appellant was with TRW as a salaried employee. He commenced this action on March 11, 1982 by filing a complaint in the Court of Common Pleas for Cuyahoga County, Ohio, alleging breach of contract and misrepresentation claims against TRW. These claims stemmed from his attempt to retire under the TRW hourly pension plan rather than upon the TRW salaried pension plan, asserting that he had the right to do so pursuant to his emloyment contract or alternatively, because agents of TRW stated that he was entitled to such an option. TRW removed the action to the district court on April 19, 1982, alleging original jurisdiction under the Labor Management Relations Act, 29 U.S.C. Section 185, and the Employee Retirement

Income Security Act of 1974, 29 U.S.C. Section 1132 ("ERISA").

Following discovery, the district court notified the parties of a final pretrial hearing scheduled for December 13, 1983. Prior to that hearing, the parties engaged in a series of settlement discussions which ultimately produced a settlement offer by TRW dated November 10, 1983. The appellant thereupon notified the district court of the proposed settlement agreement, and on December 22, 1983, the district court dismissed the case, without prejudice, retaining "complete jurisdiction to vacate [the dismissal] and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary."

In February, 1984, TRW dispatched a revised proposal to the appellant. On June 14, 1984, the appellant requested additional information from TRW. In a

June 26, 1984 letter, TRW invited the appellant to present further questions concerning the proposed settlement agreement. By letter dated November 29, 1984, the appellant made two inquiries regarding certain provisions contained in TRW's proposal. On January 15, 1985, the attorneys for both parties engaged in a telephone conversation during which TRW's attorney addressed the two questions posed by the appellant. In a letter to the appellant dated January 17, 1985, TRW stated that it had submitted the proposed settlement agreement to TRW officials for final approval, and would forward the final draft to the appellant "shortly."

A few days thereafter, TRW officials notified its attroneys that the proposed settlement agreement was not acceptable to TRW, who, in turn, telephonically communicated to the appellant TRW's revocation of the proposal on February 8,

1985. The appellant's response to the revocation surfaced six months later when he filed his motion to reduce the purported settlement agreement to a judgment on August 14, 1985.

On September 11, 1985, TRW filed its memorandum in opposition to the appellant's motion to reduce the settlement to a judgment and its motion to dismiss the appellant's action for failure to prosecute.

The appellant's motion was heard on September 12, 1985. TRW argued that the motion to enter judgment on the settlement should be denied because no settlement agreement had been consummated. The district court agreed, and accordingly, denied the appellant's motion on September 23, 1985.

On October 31, 1985, the district court filed its memorandum and order granting TRW's motion to dismiss with prejudice the appellant's action for failure to prosecute. The district court determined that the

appellant had pursued a course of dilatory conduct throughout the entire fourteen months of settlement negotiations, highlighted by an additional six month delay in notifying the district court of the impasse in resolving the controversy without further court intervention. The district court reasoned that dismissal pursuant to Rule 41(b)[1] was proper because: (1) the protracted delays by the appellant extending over 20 months were "inexcusable"; and (2) the unreasonable delays prejudiced the defendant's ability to present an adequate defense.

1/ Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.
>
> * * *
>
> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The appellant timely filed his notice of appeal on December 2, 1985. The standard for review of the district court's dismissal of the case is whether the district court abused its discretion. Link v. Wabash Railroad Co., 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962). "The authority of a federal trial court to dismiss a plaintiff's action because of his failure to prosecute cannot seriously be doubted." Id. at 629, 82 S.Ct. at 1388 (footnote omitted). "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Id.

Predicated upon the foregoing factual history of the case at bar and applicable legal precedent, this court concludes that the district court did not abuse its discretion in its dismissal of the appellant's action as a result of his

inexcusable delay in prosecuting his case. Accordingly, the judgment of the district court is AFFIRMED.

RYAN, Circuit Judge; concurring in part, dissenting in part. In my judgment, this case ended with the trial court's entry of its December 22, 1983, order dismissing the case, without prejudice. That order stated:

> "The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.
>
> "IT IS ORDERED that this action is hereby dismissed, without prejudice. The court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary."

Since the defendant's answer had been filed, the dismissal was necessarily pursuant to Fed. R. Civ. P. 41(a)(2). The rule provides that a dismissal thereunder may be ordered "upon such terms and conditions as the court deems proper." It is debatable, at

the very least, whether the trial court's recitation that is retained "jurisdiction to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary" is an appropriate term or condition of dismissal under Rule 41(a)(2). I have located no case imposing nonmonetary conditions upon such a dismissal, although at least one court is apparently of the view that nonmonetary conditions may be imposed consonant with Rule 41(a)(2). McCall-Bey v. Franzen, 777 F.2d 1178 (7th Cir. 1985). Even if the practice were commonplace, however, it is not one that is conducive to the efficient administration of justice.

What is more important in the case before us, however, is that even if the validity of the court's retention of jurisdiction to "vacate this order and to reopen the action" as a term or condition of dismissal under Rule 41(a)(2) be assumed, it

is nevertheless clear that the trial court never entered an order vacating its December 22, 1983 dismissal. Consequently, from that day forward, this litigation was not before the trial court and it had no jurisdiction to enter its orders of September 23, 1985, denying the plaintiff's motion to reduce a settlement to judgment, and the October 31, 1985, order dismissing the action with prejudice.

A civil action before the district court cannot be dismissed and not dismissed at the same time. A dismissal even without prejudice under Rule 41(a)(2) "leave the situation the same as if the suit had never been brought in the first place." Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959).

For the foregoing reasons, I concur in the result reached by the Court today, but disagree with its reasoning.

ISSUED AS MANDATE: March 6, 1987

COSTS: None

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACK J. HRIBAR	)	CIVIL ACTION NO.
	)	C82-1064
Plaintiff	)	
	)	MEMORANDUM AND ORDER
TRW, INC.	)	
	)	
Defendant	)	

ALDRICH, J.

Pending before the Court is defendant's motion to dismiss this action for failure to prosecute. For the reasons set forth below, this motion is granted.

Jack J. Hribar began this action against TRW, Inc. ("TRW"), his former employer, in March, 1982 in the Court of Common Pleas of Cuyahoga County, Ohio. The suit was subsequently removed to this Court. Discovery was conducted, and TRW's motion for summary judgment was denied. Before the final pre-trial conference which was scheduled for December 13, 1983, this Court dismissed the case without prejudice upon the representation that the case had been or

would be settled.

The Court received no communication from either party during the subsequent ninteen months. On August 14, 1985, Hribar filed a motion to reduce settlement agreement to judgment. Following a hearing on this motion in chambers, the Court denied the motion because Hribar had failed to prove that a settlement existed, and the case was reactivated on its docket. Hribar v. TRW, Inc., No. C82-1064, slip op. (N.D. Ohio September 23, 1985).

Hribar does not dispute any of the facts stated by TRW in its motion to dismiss. On February 8, 1984, TRW's counsel sent a copy of a proposed settlement agreement to Hribar's counsel for review. Four months elapsed before Hribar's response, which indicated that he needed additional information, was sent to TRW on June 14, 1984. In a June 26, 1984 letter, TRW invited Hribar to present questions about the

proposed settlement; none were submitted until November 29, 1984. Sporadic discussions followed, and on January 15, 1985, counsel for Hribar and TRW participated in a telephone discussion which only Hribar's attorney construed as an acceptance of the settlement offer. On February 5, 1985, TRW's attorney informed Hribar's attorney that the settlement offer had been withdrawn by his client. After six more months elapsed, Hribar filed a motion to reduce the settlement agreement, which was ostensibly reached on January 15, 1985, to judgment.

Fed. R. Civ. P. 41 (b) ("Rule 41(b)") provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him....

The Supreme Court has identified two reasons why the power to dismiss for failure to prosecute is necessary. First, it is essential to avoid undue delays in disposing

of pending litigation. Second, it alleviates congestion of the dockets of district courts. Link v. Wabash R. Co., 370 U.S. 626, 629-630 (1962).

Both objectives of Rule 41(b) would be frustrated if this case were not dismissed. Hribar has failed to pursue a settlement in a timely manner, making virtually no overtures to TRW and responding to TRW's correspondence only after unreasonable delays. Since he became aware of the misunderstanding regarding a settlement in February, 1985, his failure to ask this Court to resolve the issue for six months is inexcusable. Hribar's lengthy delays protracted TRW's defense of this case and presumably prejudiced its ability to defend itself in the litigation which Hribar now wishes to embark upon. Moreover, if the Court were to permit this case to continue, it would be faced with similar requests from a myriad of parties who would find reasons to

reopen cases which have long been dormant. Parties who diligently litigate their actions would then be penalized by the delay caused to them by reactivating cases which should have been resolved long before.

Since Hribar has failed to prosecute his action promptly, the motion to dismiss is granted.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACK J. HRIBAR	)	
	)	CIVIL ACTION NUMBER
v.	)	C 82-1064
	)	
TRW, INC.	)	
	)	ORDER
	)	

The court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the court.

IT IS ORDERED that this action is hereby dismissed, without prejudice. The court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

ANN ALDRICH
U.S. DISTRICT JUDGE